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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 682

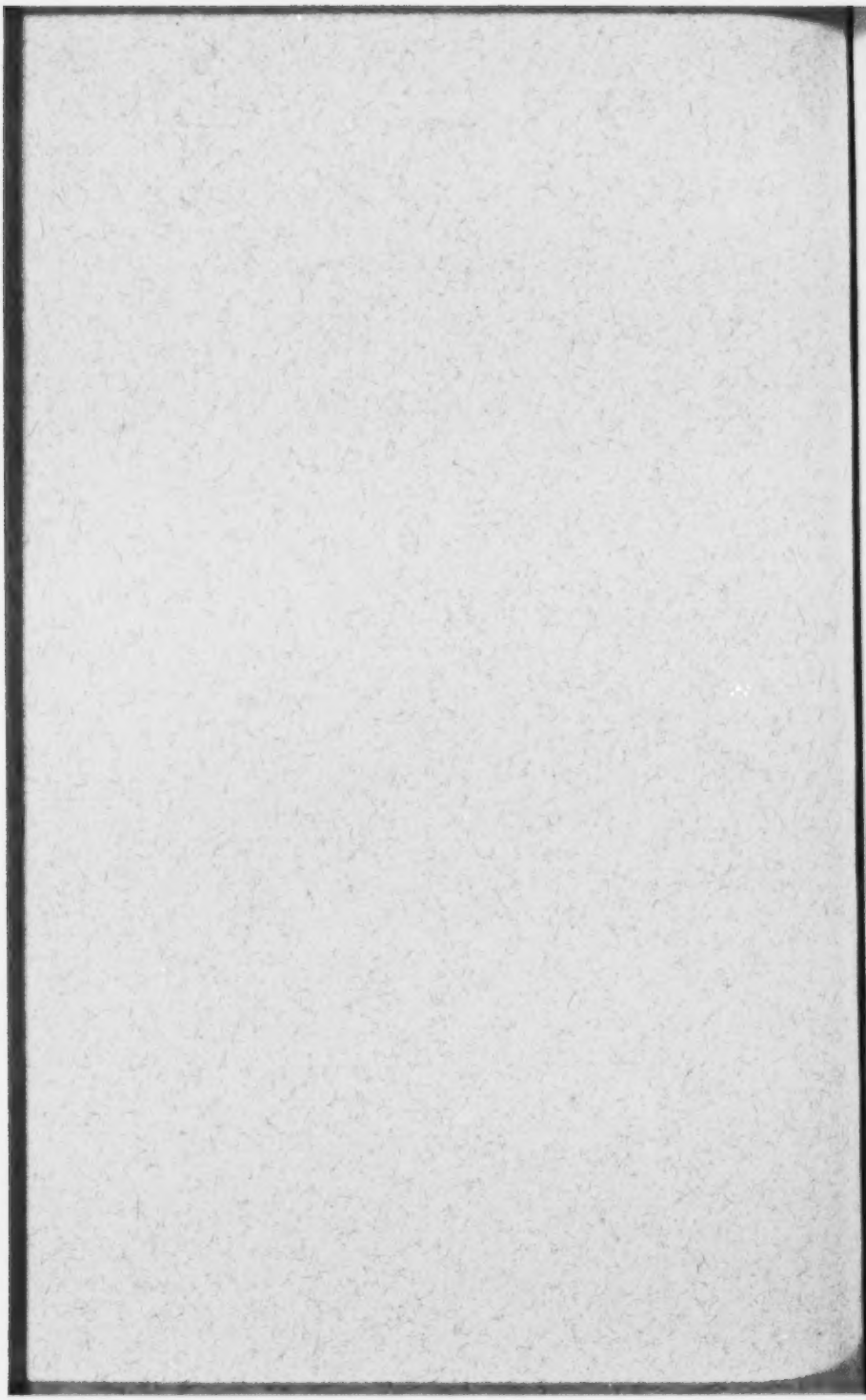
MRS. MARY BRYAN GORHAM,
Petitioner,

vs.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION OF OMAHA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

I. M. Bailey,
W. H. Yarborough,
L. L. Davenport,
J. C. B. Ehringhaus,
Counsel for Petitioner.



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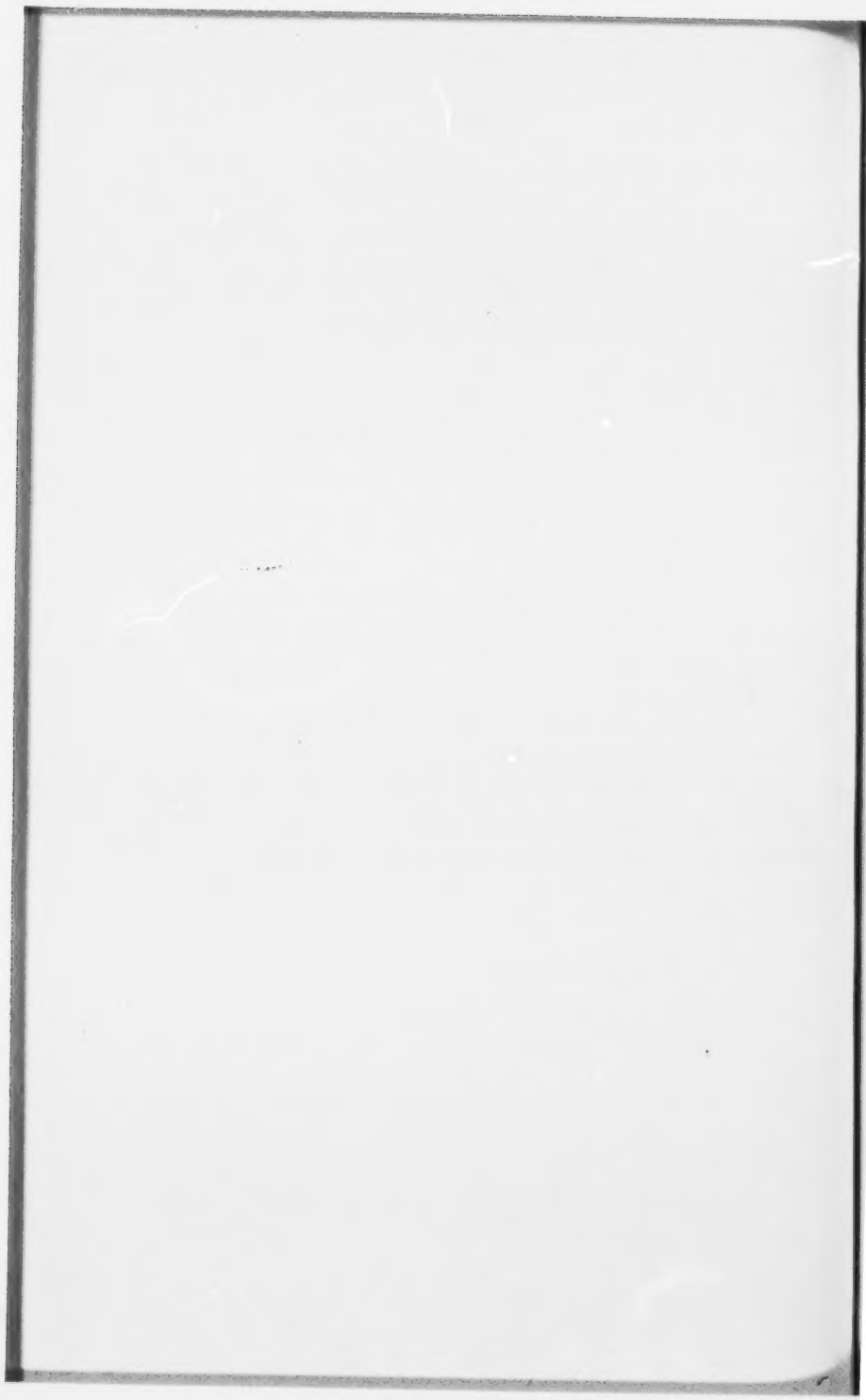

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 682

MRS. MARY BRYAN GORHAM,

Petitioner,

vs.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION OF OMAHA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In behalf of Mrs. Mary Bryan Gorham, the petitioner above named, the undersigned pray that a writ of certiorari may issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit (No. 4647), which was entered on the 22nd day of August, 1940 and is reported in 114 F. (2d) 97, and which affirmed a judgment of the United States District Court for the Eastern District of North Carolina directing and entering a verdict for the

defendant at the conclusion of all the evidence, on the ground that, upon the facts and the law, petitioner had shown no right to relief (R. 1, 2).

This action was instituted by Mrs. Mary Bryan Gorham, petitioner herein, as beneficiary, in the Superior Court of Nash County, North Carolina, on April 8th, 1939 to recover the proceeds of a certain life-accident insurance policy issued by the respondent upon the life of Dr. Louis Rhodes Gorham and was, upon petition and bond duly filed, removed to the District Court of the United States for the Eastern District of North Carolina, Wilson Division, upon the ground of diversity of citizenship. It was tried before the Hon. Isaac M. Meekins, District Judge, and a jury. At the conclusion of plaintiff's evidence the defendant moved for a directed verdict, which motion was refused. The defendant then offered its own evidence and the plaintiff her evidence in rebuttal. At the conclusion of all the evidence and upon a renewal of the motion for directed verdict, the court withdrew the issues from consideration of the jury, itself answered these issues and signed the judgment as appears in the record (R. 2-3). From this judgment the petitioner appealed to the United States Circuit Court of Appeals for the Fourth Circuit which affirmed the judgment of the District Court (R. 225). Thereafter, petitioner in due time filed with the Circuit Court of Appeals a petition for rehearing which "after consideration" was disallowed and mandate issued on the 7th day of October, 1940 (R. 241).

Opinions Below.

There was no opinion filed by the District Judge in connection with the disposition of this case. His rulings and disposition of the same appear in the record at pages 1 and 2.

The opinion of the Circuit Court of Appeals, review of which is here sought, was entered on August 22nd, 1940

and is reported in 114 F. (2d) 97 (R. 220-225). Thereafter, and in due time, namely, on September 20th, 1940, application was made as provided by the rules of the Circuit Court of Appeals, for extension of time to file petition to rehear and on said September 20th, 1940 an order was made by the Senior Circuit Judge of said court granting leave, under Rule 19 of Circuit Court of Appeals, Fourth Circuit, to file petition to rehear on or before October 2nd, 1940 and staying the mandate of the court (R. 226). Within said extended time, namely, on September 28th, 1940, a petition to rehear was filed (R. 227). On October 7th, 1940 an order was entered by the Senior Circuit Judge of the Fourth Circuit reciting that said petition, "having been carefully considered," the rehearing asked for was denied and ordering the issuance of mandate (R. 241).

This petition is filed within three months after said October 7th, 1940.

Gypsy Oil Co. v. *Escoe,* 72 L. Ed. 393;
Morse v. *U. S.,* 70 L. Ed. 519.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended, U. S. C. A., Title 28, Sec. 347(a), and Rule 38 part 5(b).

Questions Presented.

The questions involved in this petition and appeal are:

(1) In an action by beneficiary on a policy insuring against accidental death, in which it was admitted that the death of insured was the result of external and violent means (i.e., a shot in the back of his head) and there was no *direct* evidence as to how or by whom the shot was fired and the manner of insured's death was, therefore, left wholly to inference and deduction; and where there is conflict of evidence as to other facts and

circumstances relied upon to sustain the theories of homicide and suicide advanced by the parties, and experts differed as to whether the fatal shot was fired at contact or near contact (which, while entirely consistent with homicide was alone consistent with the theory of suicide) or at a distance from the head too great to be self-inflicted, should the trial judge have withdrawn the issue from the jury and himself answered it against the plaintiff, or should he have submitted it to the jury for their determination?

(2) Did the ruling of the court in effect deny to the petitioner her right of trial by jury in contravention of the Seventh Amendment to the Constitution of the United States as well as Article 4, Section 1 of the Constitution of North Carolina guaranteeing trial by jury, and of the Fourteenth Amendment to the Constitution of the United States and its requirement of procedural due process?

Statement of the Case.

To the plaintiff's claim in this action the defendant pleaded non-coverage and forfeiture. The first plea was predicated upon the suggestion of suicide and the plea of forfeiture, in several particulars, upon the alleged tardiness of the plaintiff in the filing of proofs and the institution of the action. The petitioner offered substantial evidence of her mental incapacity during the entire period of time intervening between the death of insured and the institution of this action (R. 14, 80-1, 82). The sufficiency of this proof of mental incapacity for submission to the jury was expressly passed upon by the North Carolina Supreme Court in a companion case to the case at bar entitled *Gorham* v. *Pacific Mutual Life Insurance Company,* reported in 214 N. C. 526, 200 S. E. 5, and on rehearing, in 215 N. C. 195, 1 S. E. (2d) 569. The other point, as to the timeliness of the action after first nonsuit, arising as it does upon the North Carolina Statute controlling actions

after nonsuit, is likewise disposed of by the opinion of the Supreme Court of North Carolina in the case of *Carolina Transportation & Distributing Company, et al.*, v. *Insurance Company*, 214 N. C. 596, 200 S. E. 411. The remaining plea of forfeiture, predicated upon petitioner's alleged failure to turn over to respondent (upon its demand) the results of an autopsy performed at petitioner's sole expense, requires no extended argument since such right was not provided under Section 8 of the policy which gave to the defendant Association only "the right and opportunity to make an autopsy" itself and at its own expense, which is quite a different thing from giving to respondent the right to have turned over to it the results of an autopsy performed by plaintiff petitioner at her own expense. There was also evidence tending to show that this demand by defendant was not seasonably made, but in fact was first voiced in letter of defendant's attorneys written over seven months after demand was made in behalf of plaintiff and approximately two months after suit was instituted. An issue as to the reasonableness of this request was tendered by plaintiff and refused (R. 2).

The petitioner's right to have these issues passed upon by a jury has been sustained by the North Carolina Supreme Court in the companion case of *Gorham* v. *Insurance Company*, 214 N. C. 526, 200 S. E. 5. The only real and the pivotal issue of fact raised on this Record and in the case at bar was whether the death of Dr. Gorham was due to suicide, as alleged in the answer, and the sufficiency of the evidence herein to take the case to the jury on this issue.

Summary of the Evidence.

In the early morning of March 9th, 1933, Dr. Louis Gorham, the ~~beneficiary~~ in this policy, was found by the janitress dead in his office in Rocky Mount. The door to

the office, which opened on the upstairs hall, was unlocked as was also the outer door at the foot of the steps and which provided exit to the street. This "was unusual" (R. 76-7). Deceased was found seated at his desk, with papers concerning his income tax, and upon which he had manifestly been working, lying before him. A blank filled out in pencil showed completion of the work. The gross amount of income shown for the year 1932 was almost six thousand ($6,000) dollars and the deductions properly taken for obsolescence, depreciation and exemptions indicated no tax liability.

The Doctor's safe, which he "kept locked," (R. 57), was found open and the "money box" out and empty (R. 26-7, 30, 31). This at a time when he had been making daily cash collections (R. 57), with the banks closed and nowhere else to put his cash. Some of defendant's witnesses testified that there was no sign of a struggle. None was possible as the wound was of such a character as to produce instantaneous death (R. 41).

The body, seated in chair, was leaning forward, head on desk facing to the right. The right hand was hanging down—some witnesses say between his knees while others say outside the right knee. A .32 caliber pistol lay on the floor—some say immediately beneath the right hand of deceased while others put it away from that point (R. 11, 43).

There were no bruises on the face except on the left side where the effect of pressure from head lying on the desk was evident (R. 22). There was no mark of violence except a small bullet hole in the back of his head about two inches back of and slightly above the right ear (R. 9). The unusual location of the wound—that is in the back of the head instead of in the temple or forehead or heart or mouth as usual in suicide—is noted here as a significant and important fact bearing on the issue of accidental death or suicide.

The wound itself, *at the time of death,* as described by both the undertaker and the witness Stephenson, a policeman, was "just a straight bullet wound—just a clean wound, no ragged cut or anything like this" and "about the size of a .32 bullet" (R. 10-12, 76, 19, 20, 27)—a condition entirely different from that observed by the defendant's witness, Dr. Forbus, in autopsy fourteen months after death (R. 34), and upon which latter condition, in part, Dr. Forbus predicated his opinion of "contact shot" (R. 34, 35). This difference in appearance of the wound at death and fourteen months later could readily be and should be attributed to the process of decomposition, or to the cotton stuffing or the other occurrences in the course of embalming and preparing the body for burial (R. 36-8).

The undertaker also testified positively that he cleaned this wound (washed it) before burial and thus left no smut (R. 10). The "smut" observed by Dr. Forbus in his post mortem fourteen months later and which he took to be "powder smut" and upon which, also in part, his opinion of "contact or near contact" shot was predicated (R. 34-35) was therefore necessarily and reasonably the result of the same decomposition process (R. 10-12, 37-38).

There was an entire absence of brand or burning of flesh or hair and no powder marks or tattooing about the wound observed either at the time of death or on post mortem (R. 34). Such marks, all witnesses agree, invariably are present when shot is fired at close range, while on the other hand their absence is invariable where shots were fired from a distance of at least eighteen inches (R. 71). There was also an entire absence of what defendant's witness Zimmerman called "muzzle blast," which he testified was caused, when the barrel of the gun was in close proximity to the flesh, by the effort of the gases to escape causing "much larger openings" and irregular shaped wounds (R.

78, 67-68). The absence of such "muzzle-blast" also indicated a distance shot. This witness also testified that "brands" or burning invariably occurred when the gun barrel was in close proximity to the flesh at the moment of firing and at slightest angle (R. 70). So this circumstance also indicated a distance shot.

The physical impossibility of firing a shot into one's own head at the angle traversed by the bullet in this case, according to its post mortem charting, was positively testified to and clearly demonstrated by Dr. Carpenter, an outstanding pathologist of Wake Forest College (R. 88, 89, 90). Also the inevitability of branding, of burned hair, of "tattooing" (R. 89) had shot been fired at close range.

Though the opinion of the Circuit Court of Appeals suggests that deceased was laboring under a delusion, not a witness testified to such. From all the testimony it appears also undoubtedly, as stated by the court in that opinion, that such a delusion "was not justified by the facts." A few pessimistic utterances are attributed to deceased by some of defendant's witnesses and a few exceedingly trivial instances are pointed out as indicating peculiar conduct. Each of these has a reasonable and full explanation in the evidence. He sometimes talked hard times (but who didn't at that period?); on the golf course just before all the banks were closed and when their closing was imminent, he inquired of a friend about the probability of such closing and what was to be done in the circumstances (R. 45-47) (a question then on the lips of all the people). Incidentally, also, the wife of this witness had quarreled with petitioner (R. 46). On one occasion instead of going home for lunch he ate a sandwich and drank a glass of milk in the drugstore (Reason: his secretary was late returning and he had an appointment with an out-of-town patient in some thirty minutes, R. 55). This also came from a witness whose wife had quarrelled and been ordered out of the house by Mrs.

Gorham. He once did the peculiar thing (R. 161, 170) of trying to collect a bill from a patient who was in the chair but the angry patient still owed the money when Dr. Gorham died (R. 58). When the dentist's former partner moved elsewhere, he reduced the salary of his secretary, who then had only one doctor to serve (R. 212, 213, 214), and some six months before his death he had replied to a loan-seeking letter from this same former partner with a suggestion that hard times and poor collections prevented full compliance. However, on both occasions Dr. Gorham sent his former partner a portion of the loan requested (R. 212, 213, 214).

On the record there is no substantial reason for suicide. The Doctor was in good financial condition, "Well to do" as one witness expressed it (R. 59), his practice was large for a country dentist (R. 48), his cash collections, even on the day of his death, high (R. 56, 57), and his total earnings were at the time of his death, when judged by the last five days of his active life, averaging near twelve thousand ($12,000) dollars per year in that darkest of modern years, 1933 (R. 56-7, 61), and he had engagements three days ahead (R. 56).

His wife also had an independent income (R. 59, 174); his only debt (to the bank) was small and not being pressed (R. 60). Indeed, the banker stated he had ample unused credit, if he had desired to use it (R. 60), as well as unused loan value on insurance policies (R. 65).

His wife, to whom, according to all witnesses, he was devoted, was ill and needed him more than ever (R. 82); he was deeply religious (R. 81); gentle (R. 45); calm (R. 83, 79); a devoted family man (R. 81-4); even tempered (R. 60); not given to emotionalism or excitement (R. 79); he had no bad habits and practiced no indulgences that might weaken his will or encourage pessimism and, though the record shows a family history of mental disease in the wife,

there is no evidence of any such inheritance on the part of the Doctor. The last day in his office was a very good one (R. 56), and the last man to see and talk to him at near midnight says that he found him quite normal and noted his more than usual "jovial" attitude (R. 79).

Significantly and in contrast with the usual, there was no evidence of preparation for suicide, no note or message or attempt, no threats or warning of such an intention and, on the record, no justification, real or imaginary for such rashness.

On the contrary, there was evidence both of opportunity and motive (robbery) for homicide, and sufficient evidence to have convicted therefor if only the assailant could be identified. In other words there was plenitude of evidence from which a jury might find homicide but no substantial reason for suicide.

It is suggested that the pistol found on the floor of the office belonged to the Doctor but the only evidence of this was remarks attributed to an admittedly frantic, irrational and demented wife in the first presence and shock of his dead body and it is significant that these remarks appear to be after-thoughts, never mentioned by the witnesses until years after the occurrence. Their purport was negatived by the testimony of the Doctor's secretary, Mrs. Ward, that in all the years of her service she had never seen a pistol in the office (R. 58). The pistol found was a plain ordinary .32 calibre Iver Johnson with no distinguishing marks when found.

Cracks in the skull observed in post mortem (R. 98) the wobbly course of the bullet (R. 103) and its downward instead of upward range (R. 100) all indicated a distance rather than a contact or near contact shot.

Significant, too, though from the location of the fatal wound and the testimony of a witness (R. 44) it was practically impossible to grip a pistol in the manner necessary

to inflict a wound of this character on one's self without leaving finger prints and though every precaution was taken by the police to preserve prints on the pistol (R. 29, 44, 20-28), and though the dead man's prints were taken for purposes of comparison and some of these were good (R. 28), and though these were all sent to the State Finger Print expert for comparison immediately after the occurrence, the expert could not identify a single print on the pistol as being Dr. Gorham's. Little or no effort was made to identify the prints as belonging to another.

More significant is the fact that Dr. Gorham's glasses, though on the body when found, were "badly spattered" with blood (R. 10, 22). From the evidence there was no way in which these glasses could have become badly spattered with blood unless at one time they had been upon the floor near the dripping blood, for the wound was in the back of the head and the glasses, of course, were on the face when the body was found. Manifestly, the dead man could not have picked up the bloody glasses and put them back on, but inferentially a killer could have done so in rearranging the body to give the semblance of suicide.

On the other hand, every particle of testimony on which the suicide theory is predicated was contradicted in the Record. It was built solely and absolutely upon the theory that the fatal shot was a contact or near contact shot. That was the extent of Dr. Forbus' opinion (R. 40-1). While such a shot was just as consistent with homicide as with suicide other evidence herein detailed and experiments conducted by plaintiff's witness, Dr. Carpenter, tended to show, on facts in evidence, that the fatal shot in this case was fired from a distance of at least six inches from the head and could not have been self-inflicted (R. 86 to 105 inclusive). And while Dr. Carpenter admittedly never examined the body of deceased and Dr. Forbus did (fourteen months after death) the testimony of both was merely opinion as to the

proximity of the gun at the moment of the fatal shot—opinion based on facts testified to by witnesses at the trial. Their testimony was of the same character and it is difficult to find justification for the statement in the opinion of the Circuit Court of Appeals that Dr. Carpenter's testimony "had no probative value" unless all opinion testimony must be so classed. Such a rule would put out of the case not only the Carpenter but the Forbus' opinion also and with it would go the entire predicate for the suicide theory. Forbus gave opinion based on conditions observed plus opinions he formed from other observation and experiment. Carpenter gave opinion on conditions observed by Forbus, by the undertaker, the policeman and others plus his own experiments and qualitatively they are the same.

There was also evidence in the Record contradicting the main factors recited by Dr. Forbus as the predicate for his opinion (R. 34-35). Plaintiff's evidence regarding the cleansing of the wound by undertaker before burial, contradicts the Forbus opinion that the smut he observed on post mortem fourteen months after death was smut from a shot fired in close proximity.

Most emphasized and important in the Forbus opinion is his testimony that, in his opinion, the granular substances found in the brain on post mortem were unexploded and partly exploded black powder. This opinion is definitely questioned, even contradicted, by the testimony of Dr. Carpenter that dried tissues and blood would present the same appearance (R. 100-2, 97), that Dr. Forbus' analysis, according to his own admissions, was "uncertain" (R. 42-3) and that "it is not usually possible" (R. 102) to speak with certainty in the identification of granules as being powder granules and further (R. 102) that this witness "would personally hesitate to speak with positiveness" after so long a time and so little study.

Yet the assumption that these granules were powder is made a vital, important and determinative part of the factual predicate for the Forbus opinion that the shot was a contact or near contact shot, and this in spite of every other fact observed and admitted as indicating the contrary (no burns, no brand, no tattooing, no singed hair, no muzzle blast). However, in reaching their opinion the district Judge and the Circuit Court of Appeals apparently accepted as established and conclusive this evidence introduced by defendant, the credibility of which was both questioned and contradicted as above set out.

The opinion also suggests that plaintiff's signature to other proofs of loss on other policies binds her. This suggestion is met by the uncontradicted evidence (a) that she did not read but merely signed as requested (R. 63, 64, 73), and (b) that she was mentally incompetent at the time, (R. 14). The evidence above detailed sufficiently meets the Circuit Court of Appeals' suggestion that the opinion of "friends" or the neighborhood binds or concludes her cause.

From all of the above it would seem manifest that there was reasonable, if not a strong, evidential support for either theory—that is homicide or suicide—but conclusive proof of neither and that a jury question was presented on the Record.

Grounds Relied Upon for Granting the Writ.

I. For that the Circuit Court of Appeals of the Fourth Circuit, in holding that the evidence of violent death from external means (particularly when supported by other facts tending to contradict the suicide theory and to support the theory of homicide) did not raise a *prima facie* case, decided an important question of law in conflict with the local and applicable decisions of the Supreme Court of

North Carolina, though by the North Carolina statute, by the provisions of the policy itself, and under the decisions of this court in *Erie Railroad* v. *Tompkins,* the local law was controlling.

North Carolina Consolidated Statutes, Section 6287;
Policy Provision, Section 15;
Warren v. *Ins. Co.,* 215 N. C. 402, 2 S. E. (2d) 17 (1939);
Wharton v. *Ins. Co.,* 178 N. C. 135, 100 S. E. 266;
McGill v. *Lumberton,* 215 N. C. 752, 754, 3 S. E. (2d) 324;
Erie Railroad v. *Tompkins,* 82 L. ed. 1188;
Gorham v. *Ins. Co.* (Companion case), 214 N. C. 526, 200 S. E. 5 (Same case on rehearing), 215 N. C. 195, 1 S. E. (2d) 569.

II. For that the Circuit Court of Appeals of the Fourth Circuit, in so holding, decided an important question of law in conflict with decisions in other Circuit Courts of Appeal.

Equitable Life Assur. Soc. v. *Salmen,* 81 F. (2d) 571;
Metropolitan Life Ins. Co. v. *Hogan,* 63 F. (2d) 654;
Columbian Nat'l Life Ins. Co. v. *Comfort,* 84 F. (2d) 291;
Connecticut General Life Ins. Co. v. *Maher,* 70 F. (2d) 441;
(And others cited in Brief attached.)

III. For that the Circuit Court of Appeals of the Fourth Circuit, in so holding, decided an important question of law in conflict with the decisions of the Supreme Court of the United States.

New York Life Ins. Co. v. *Gamer,* 303 U. S. 161, 82 L. ed. 726, 114 A. L. R. 1218;
Del Vecchio v. *Bowers,* 296 U. S. 280, 80 L. ed. 229,

IV. For that the Circuit Court of Appeals for the Fourth Circuit, in so holding and particularly in withdrawing the issues from the jury and itself answering them, so far departed from the accepted and usual course of judicial procedure and the constitutional requirements for procedural due process or so far sanctioned such departure by a lower court as to call for an exercise of this court's power of supervision.

United States Constitution, Seventh Amendment;
United States Constitution, Fourteenth Amendment.

WHEREFORE, your petitioner respectfully prays that her petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit be granted.

Filed in the Supreme Court of the United States this 7th day of January, 1941.

I. M. BAILEY,
W. H. YARBOROUGH,
L. L. DAVENPORT,
J. C. B. EHRINGHAUS,
Attorneys for Petitioner,
Mrs. Mary Bryan Gorham.